

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEVIN SELKOWITZ, and individual,

Plaintiff,

v.

LITTON LOAN SERVICING, LP, a
Delaware Limited Partnership; NEW
CENTURY MORTGAGE CORPORATION,
a California corporation; QUALITY LOAN
SERVICE CORPORATION OF
WASHINGTON, a Washington Corporation;
FIRST AMERICAN TITLE INSURANCE
COMPANY, a Washington Corporation;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., a
Delaware Corporation; DOE DEFENDANTS
1-20,

Defendants.

Case No. C10-5523-JCC

ORDER TO SHOW CAUSE

This matter comes before the Court sua sponte. Since issuing its previous order (Dkt. No. 22) the Court has had some of the relevant issues presented in a different light. (*E.g.*, *Bain v. Metropolitan Mortgage Group, Inc., et al.*, C09-0149 (September 20, 2010 Order, Dkt. No.

1 130).) The Court has determined that under certain circumstances, a withdrawal of the Court's
2 previous order (Dkt. No. 22) may become appropriate.

3 The Court is now convinced that the issue of whether MERS was an authorized
4 "beneficiary" under Washington's Deed of Trust Act requires further inquiry. The Western
5 District of Washington has not squarely addressed this issue. *See Moon v. GMAC Mortgage*
6 *Corp.*, No. C08-0969-TSZ, 2008 WL 4741492, at *3 (W.D. Wash. Oct. 24, 2008) ("Simply
7 because MERS registers documents in a database does not prove that MERS cannot be the
8 legal holder of an instrument.") The Bankruptcy Court for the Western District of Washington
9 has expressed doubt as to whether MERS can act as a beneficiary. *In re Jacobson*, 402 B.R.
10 359, 367 & n.2 (W.D. Wash. Bankr. Mar. 6, 2009) ("In Washington, only the holder of the
11 obligation secured by the deed of trust is entitled to foreclose[,] which renders problematic the
12 identification of MERS 'solely as nominee' as the beneficiary of Jacobsons' deed of trust.
13 Having an assignment of the deed of trust is not sufficient because the security follows the
14 obligation secured, rather than the other way around. This principle is neither new nor unique
15 to Washington . . ."). Other courts are split on this issue. The Bankruptcy Court for the
16 Eastern District of California recently concluded, using the same analysis suggested by
17 Plaintiff, that MERS cannot be the beneficiary. *In re Walker*, No. 10-21656, at *2 (E.D. Cal.
18 Bankr. May 20, 2010) ("Since MERS did not own the underlying note, it could not transfer the
19 beneficial interest of the Deed of Trust to another. Any attempt to transfer the beneficial
20 interest of a trust deed without ownership of the underlying note is void under California
21 law.").

22 Accordingly, the Court STAYS all proceedings in this case. All parties are ORDERED
23 to show cause why the Court should not submit this issue to the Washington Supreme Court as
24 a request for certification pursuant to WASH. REV. CODE § 2.60.030. The parties shall respond
25 to this order simultaneously no later than October 27, 2010, in briefs no longer than ten pages.

26 In their responses, the parties shall address the following issues:

- 1 1. Whether Washington has addressed Mortgage Electronic Registration Systems'—
2 and similar organizations'—ability to serve as the beneficiary and nominee of the
3 lender under Washington's Deed of Trust Act when it does not hold the promissory
4 note secured by a deed of trust. *See* 61.24.005(2) (defining "beneficiary").
- 5 2. Whether Washington has addressed the legal effect in a nonjudicial foreclosure of
6 an unauthorized beneficiary's appointment of a successor trustee.

7 The Court RESETS the noting date for Defendant Quality Loan Service Corporation's
8 motion to dismiss (Dkt. No. 24), and Plaintiff's motion to amend judgment (Dkt. No. 25) to
9 October 27, 2010.

10 Dated this 6th day of October, 2010.

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A handwritten signature in black ink, reading "John C. Coughenour", written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE